



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: FEBRUARY 28, 2023

IN THE MATTER OF:

Appeal Board No. 609557

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination (December 24, 2018) holding EXECTRANSPORT, INC., DBA EAST COAST WORLDWIDE LIMOUSINE (hereinafter

"the employer" or "Exec"), liable for tax contributions effective 2015 based on remuneration paid to the claimant (KM) and to all other individual black car drivers similarly situated as employees based on supervision, direction, or control (Appeal Board No. 609556 and 019-13182).

The Department of Labor deemed the claimant to be an employee with credited remuneration from the employer regarding the claim for benefits filed effective June 4, 2018 (Appeal Board No. 609557 and).

The employer requested a hearing, contending that the claimant and all other black car drivers similarly situated performed services as independent contractors.

The Administrative Law Judge (hereinafter ALJ) held combined telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer and the Commissioner of Labor. By decision filed November 22, 2019, the ALJ granted the employer's application to reopen a prior case and sustained the initial determination.

The employer appealed the ALJ's decision to the Appeal Board, insofar as it sustained the initial determination. The Board considered the arguments contained in the written statement submitted on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Exec operates a ground transportation service base, regulated by the NYC Taxi & Limousine Commission (hereinafter TLC), dispatching black car limousines for its clients. Exec owned or leased no vehicles, and no drivers were acknowledged employees of Exec. At any given time, Exec had about 100 drivers deemed independent contractors who used their own vehicles. Exec recruited drivers via word of mouth and advertised in an industry publication (i.e., Black Car News). Exec verified that all drivers were properly authorized by the TLC. Often, Exec's clients made reservations, which information included pickup and drop-off locations, as well as passenger identification. Such reserved trip requests were preassigned to Exec's selected drivers. All other on-demand trip requests were offered through Exec's electronic platform that communicated with a driver's third-party mobile application (i.e., Limosys) downloaded onto the mobile phone. A nearby driver was offered such on-demand trip; if a driver declined, the platform sent the trip offer to the next nearby driver until it was accepted. Exec charged its clients a flat rate to transport from one geographic zone to another zone, or on an hourly basis when a client had multiple stops. Exec's website, in part, provided the following information:

OUR CHAUFFEURS

POLISHED, PUNCTUAL & PROFESSIONAL

There's a reason we don't simply call them "drivers". Our fleet makes all the difference and provides you with the true value in a car service your team requires. Our chauffeurs work closely with our fleet success team to ensure our service standard is carried throughout each and every ride you take.

As we always say, you're a professional, so traveling like one deserves a perfectly pristine experience from start to finish. Our chauffeurs will never be without proper attire, hygiene, and courtesy. The best part is that we'll send your favorite chauffeurs upon request when available. Book in advance and you'll likely have that choice chauffeur waiting outside.

We turn down 75% of all applicants to ensure the fleet is fit for East Coast clientele. Would you put your CEO in a 10-year-old red Camry with a driver in a New York baseball cap? No, we know you wouldn't.

The claimant, who procured the requisite TLC credentials and leased a TLC

ready vehicle from a third-party leasing company, heard about Exec through word of mouth. Upon telephoning Exec, it advised the claimant of the various requirements. He visited and spent several hours at Exec's base location where Exec reviewed his documentation, inspected his vehicle, reviewed Exec's zone map with him, and provided him with an orientation regarding the download and use of the mobile app, the need to be dressed presentably, the use of the vouchers for specific corporate clients, the need to prominently display a window sign in the vehicle, and the need to display a passenger sign inside the airport. Exec also provided markers to be used on passenger signs and supplied bottled water for passengers' enjoyment.

On September 29, 2017, the claimant executed Exec's Franchise Agreement that provided, in part, as follows:

- * Driver shall pay Exec a franchise fee of \$4,160.00 for a term of one year, and for each renewal term, which can be paid in 52 installments of \$80 per week [§ A.]

- * Driver must have a mobile data device with data service or lease such a device from Exec for \$20.00 per week [§ B.2.]

- * Driver shall possess a "late model four-door luxury sedan or sport utility vehicle"; Exec "strongly recommends" a vehicle not more than four-years-old; and Exec has the sole discretion to approve the vehicle [§ B.3.]

- * Driver shall replace the vehicle upon Exec's notice that the "current vehicle is no longer suitable"

[§ B.4.]

- * Exec may suspend the driver's right to use Exec's platform "until such time as the total [TLC] points assessed against [the driver] is less than two" [§

B.10.(b)]

- * Drivers are "encouraged to dress in a professional manner" [§ B.11.]

- * Driver shall pay Exec a \$250.00 security deposit to secure the driver's "obligations" under this Agreement [§ B.18.]

- * Driver shall pay Exec "any and all periodic special assessments" imposed by Exec [§ B.20.]
- * Driver shall "submit vouchers properly completed and signed by the customer" [§ D.1.]
- * If a "customer refuses or fails to pay a voucher," then the driver shall reimburse Exec the "amount he was paid" on such voucher [§ D.5.]
- * For customers on a cash basis, the driver "shall collect the fare" [§ D.6.]
- * Driver shall pay Exec a "voucher processing fee" of \$2.00 per voucher [§ D.7.]
- * Exec shall charge the driver fee based on a percentage of the net voucher amount: (1) If the driver's base license affiliation is with Exec, then 32.5% if payment to driver is made within 14 days, or 35% if payment to driver is made within 3 days; (2) If the driver's base license affiliation is with another entity, then 37.5% if payment to driver is made within 14 days, or 40% if payment to driver is made within 3 days; (3) additional 5% if payment to driver is made within 24 hours (business days); and (4) Exec reserves the right to alter this payment schedule [§ D.8.]
- * Exec reserves the right to increase the driver "fees and/or impose additional fees" upon 30-days' notice [§ D.10.]
- * During the term of this Agreement and thereafter, the driver may not disclose any confidential information [§ H.1.]
- * During the term of this Agreement and one-year thereafter, the driver may not solicit Exec's customers [§ H.2.]
- * Driver shall submit to any "testing for drugs, alcohol or other controlled substances", which shall include random testing at Exec's sole discretion [§ J.1.]

Contrary to this Agreement, the claimant made no payments to Exec. Soon thereafter, he logged into the app and commenced providing black car

transportation services for Exec. By logging onto the app, the claimant made himself available for on-demand trips, viewed how many other drivers were in a zone, was able to message the base dispatcher, accepted or rejected offered trips, communicated pick-up and drop-off of passengers, recorded any incurred expenses (e.g., tolls), and closed-out completed trips. Exec's dispatchers regularly communicated with the claimant regarding his availability to schedule him for prearranged (reserved) trips. The claimant was required to use of written voucher form for one specific corporate client.

Exec's dispatchers were always available via phone for any issues. The claimant was in constant phone communication with a dispatcher for various reasons, including the claimant's availability for the following day(s) regarding preassigned trips, where he should go to wait for a trip offer, and his estimated time of arrival and any potential delays in timely reaching a trip's pickup location. Pursuant to instructions from a dispatcher, the claimant was advised that he should accept all offered trips when logged on, could not reassign an accepted trip to another driver, and should communicate when and why he could not perform an assigned or offered trip. Any reassignment/transfer of trips to a substitute driver was handled by Exec's dispatchers.

When the claimant was involved in a minor motor vehicle accident, Exec's fleet manager instructed the claimant to take photos of the vehicle and the accident site, which photos were reviewed by the manager. On another occasion, Exec issued a message to all drivers about driving too fast. Exec produced a driver-witness who also made no payments for the purported franchise and was paid on a weekly basis.

Exec handled all the billing and collection. Exec assigned the claimant vehicle and vendor numbers for its use in creating the summary of payments (Exhibit 9) and the weekly invoice (Exhibit 8) that shows that Exec retained 35% and the claimant received 65% of the fares. The full amounts for tolls, parking and gratuity are passed along to driver. Exec paid the claimant weekly via check or direct deposit and issued IRS 1099 forms in his in personal capacity. The claimant worked from approximately September 2017 through January 2018 when he stopped all communication with Exec. He was not required to sell or otherwise dispose of the purported franchise.

OPINION: The evidence establishes that Exec exercised or reserved the right to exercise sufficient supervision, direction, or control over the claimant and

all other similarly situated drivers to hold an employer-employee relationship under the Unemployment Insurance Law. Here, Exec solicited drivers, inspected the claimant's vehicle, reviewed numerous documents to verify the claimant was authorized by the TLC, provided claimant with an orientation regarding, in part, the use of mobile app, the available signs, and the zone map, dispatched trip offers to the claimant via the required mobile app, set the flat or hourly rate charged to the client, communicated with the claimant when unable to perform an assigned prearranged trip or accepted on-demand trip, obtained a substitute driver, supplied bottled water for its client's passengers, supplied two types of signs and markers, handled the billing and collection, and paid the claimant in his personal capacity on a weekly basis. Exec's dispatcher was always available via phone for any issues. When the claimant had a motor vehicle accident, Exec's fleet manager instructed the claimant to take photos of the vehicle and the accident site for review. Exec's website characterizes its drivers as chauffeurs who will always be with "proper attire, hygiene, and courtesy."

Also, the Franchise Agreement provided, in part, that Exec had the sole discretion to approve the driver's vehicle and the driver must replace the vehicle if Exec determined that the "current vehicle is no longer suitable"; Exec may suspend the driver's right to use the platform if the TLC assessed the driver two or more points; the driver should dress in a "professional manner" and must collect any cash fare; Exec prohibited the driver from disclosing any confidential information and from soliciting its customers; and the driver must submit to any "testing for drugs, alcohol or other controlled substances" at the sole discretion of Exec.

The Court has held that "it is incumbent on the Board to decide like cases the same way or explain the departure". *Matter of Charles A. Field Delivery Service Inc.*, 66 NY2d 516 (1985). See also *Matter of Casey (Larkfield Lottery)*, 140 AD2d 925 (3d Dept 1988). This case is like other employer-employee relationships that were upheld by the Court wherein transportation companies dispatched and paid its limousine drivers. See *Matter of Aleksanian (Corporate Transportation Group, Ltd.)*, 180 AD3d 1307 (3d Dept 2020); *Matter of Tsai (XYZ Two Way Radio Service, Inc.)*, 166 AD3d 1252 (3d Dept 2018); *Matter of Kim (SUK Inc., DBA Rainbow Limousine)*, 127 AD3d 1487 (3d Dept 2015); *Matter of Khan (Mirage Limousine Service, Inc.)*, 66 AD3d 1098 (3d Dept 2009); *Matter of Odyssey Transportation, LLC*, 62 AD3d 1175 (3d Dept 2009); *Matter of Automotive Service Systems, Inc.*, 56 AD3d 854 (3d Dept 2008); *Matter of Eliraky (Crosslands Transportation, Inc.)*, 21 AD3d 1197 (3d Dept

2005); Matter of Spectacular Limo Link, Inc., 21 AD3d 1172 (3d Dept 2005); and Matter of De Paiva (Olympic Limousine, Inc.), 270 AD2d 534 (3d Dept 2000). See also Combined Appeal Board Nos. 596683 & 596684; Combined Appeal Board Nos. 595509 & 595510; Appeal Board No. 592131; Combined Appeal Board Nos. 591599, 591600 & 591601; and Combined Appeal Board Nos. 583937 & 583939.

Exec relies on several cases where the drivers agreed to certain controls set by a committee agreement or a nonprofit membership agreement, namely, Matter of Castro (Park West Executive Servs. Inc.),

182 AD3d 879 (3d Dept 2020); Matter of Escoffery (Park West Executive Servs. Inc.), 180 AD3d 1294 (3d Dept 2020); and Matter of Pavan (UTOG 2-Way Radio Association), 173 AD2d 1036 (3d Dept 1991). However, these cases are readily distinguishable from the case at hand. Despite the executed Franchise Agreement, the claimant made no investment or otherwise had any financial interest in the purported franchise. Also, when the claimant stopped providing services for Exec, the claimant was not required to sell or otherwise dispose of the purported franchise interest. Further, the Court has found similar franchise-like agreements insignificant. See Matter of Aleksanian (Corporate Transportation Group, Ltd.), 180 AD3d 1307 (3d Dept 2020); Matter of Tsai (XYZ Two Way Radio Service, Inc.), 166 AD3d 1252 (3d Dept 2018); Matter of Baez (PD 10276, Inc., DBA Jan-Pro Cleaning Systems), 143 AD3d 1190 (3d Dept 2016); Matter of Kim (SUK Inc., DBA Rainbow Limousine), 127 AD3d 1487 (3d Dept 2015); and Matter of Odyssey Transportation, LLC, 62 AD3d 1175 (3d Dept 2009).

We are further unpersuaded that drivers may negotiate their payrate. Rather, pursuant to the Agreement, drivers merely chose a preset percentage to be paid to Exec depending on how quickly the driver wanted to be paid from closing out a trip, for instance, within 14 days, 3 days, or 24 hours (business days).

Under the totality of the circumstances, the claimant and all other similarly situated black car drivers are covered employees of Exec for purposes of unemployment insurance.

DECISION: The decision of the Administrative Law Judge, insofar as appealed, is affirmed.

The initial determination, holding EXECTRANSPORT, INC., DBA EAST COAST WORLDWIDE LIMOUSINE, liable for tax contributions effective 2015 based on remuneration paid to the claimant (KM) and to all other individual black car

drivers similarly situated as employees, is sustained.

(Appeal Board No. 609556 and 019-13182)

The claimant is deemed to be an employee with credited remuneration from the employer regarding the claim for benefits filed effective June 4, 2018.

(Appeal Board No. 609557 and)

RANDALL T. DOUGLAS, MEMBER